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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

STEPHEN LAW,

Plaintiff and Appellant,

v.

DAVID LIEU et al.,

Defendants and Respondents.

B209707

(Los Angeles County
Super. Ct. No. GC039218)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jan A. Pluim, Judge. Affirmed in part; reversed and remanded in part.

Stephen Law, in pro. per., for Plaintiff and Appellant.

McCurdy & Leibl, John D. McCurdy and Reagan E. Boyce for Defendants and Respondents.

Stephen Law appeals from a judgment entered in favor of David Lieu, M.D., doing business as Fine Needle Aspiration, Inc. (Lieu), and Lieu's medical assistant Annie Mi, after Lieu and Mi prevailed on motions for summary judgment in this medical malpractice action. Among other arguments, Law contends summary judgment was improperly granted in favor of Lieu because the sole evidentiary basis offered on his behalf to show an absence of professional negligence (an expert declaration) was inadmissible. We agree and reverse the judgment entered in favor of Lieu. As for Mi, Law maintains she lacked the necessary qualifications to assist Lieu with the medical procedure performed on him. On this point, we conclude Law has failed to demonstrate reversible error, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of June 29, 2006, Lieu and Mi, Lieu's medical assistant, performed a fine needle aspiration procedure (FNA) to biopsy a cyst growing on the side of Law's nose. Later that afternoon, Law began experiencing discomfort, and his face began to grow red and swell. He contacted Lieu's office. Mi told him to apply ice to reduce the swelling. The pain and swelling did not subside. Law attempted, but was unable, to contact Lieu for several days. On July 6, 2006, Lieu prescribed an oral antibiotic for Law, but it failed to alleviate the problems. The pain and swelling continued to worsen and, on July 10, 2006, Law was admitted to the hospital. He remained there several days, and was treated for an abscess with intravenous antibiotics. Law was discharged from the hospital on July 13, 2006, but directed to remain home for two weeks to receive home-administered antibiotic injections. The cyst was surgically removed in 2007.

Law filed this action for medical malpractice in June 2007.¹

¹ Absent from the clerk's transcript, because Law neglected to designate them, are numerous documents, including the complaint, respondents' answer(s) and separate statements of undisputed issues in support of their motions for summary judgment, and Law's memorandum of points and authorities in opposition to Mi's motion. It is not clear from the register of actions whether all the missing papers were even filed with the trial

In December 2007, Lieu and Mi filed independent motions for summary judgment. Each argued that his or her care and treatment of Law was appropriate and within community standards, and that no act or omission on the part of either respondent was a substantial cause of Law's injury.

Lieu's summary judgment motion was supported by two declarations. One was from an attorney. Attached to the attorney's declaration were documents she described only as "true and correct cop[ies] of selected excerpts from [Law's] medical records from [Dr. Lieu]." "Selected excerpts" of Law's records from the hospital, the home health care agency and a plastic surgery center, were also attached to the attorney's declaration, as was an incomplete copy of a "consent form signed by [Law] regarding the risks associated with FNA.

The second declaration was from Barbara Florentine, a board-certified cytopathologist, who offered an expert opinion. Florentine declared she had "reviewed the medical records in this matter involving [Law], as well as the declaration of [Lieu] regarding the procedure performed on [Law].^[2] The medical records included [Law's] records from" Lieu, the hospital and the home health care agency. Florentine stated that, on June 29, 2006, Law was seen by Lieu "for a fine needle aspiration . . . of a mass growing on the right side of his nose. [Law] signed a consent form acknowledging the risks associated with the FNA procedure. The procedure was performed that same day by [Lieu] with the assistance of [Mi]." Florentine went on to state that, "[o]n July 6, 2006, [Law] contacted [Lieu's] office about redness, pain and swelling around the area of the FNA. In response, [Lieu] prescribed an oral antibiotic. However, [Law's] symptoms persisted." After a brief recitation of the chronology of Law's subsequent medical treatment, Florentine opined that, based on her education and training, it was her "belief

court. Our factual recitation is drawn from facts established by the record, or on which the parties agree.

² The record does not reflect that Lieu submitted a declaration in support of his own motion. It appears Florentine was referring to the declaration he submitted in support of Mi's motion for summary judgment.

that Dr. Lieu's care and treatment of [Law] was at all times and in every respect within the accepted community standards for a physician specializing in cytopathology." She further opined that Law "was properly consented," and that "Dr. Lieu properly performed the fine needle aspiration using sterile techniques," had "provided the appropriate aftercare," and that the complications Law experienced "were not indicative of a failure to meet the standard of care." Florentine also stated that, it was her opinion, "that to a reasonable degree of medical probability, no deviation from the standard of care on Dr. Lieu's part was a substantial factor in causing any injury to [Law]." Florentine did not specifically identify which medical records she relied on, nor were any documents attached to her declaration.

Mi's summary judgment motion was also supported by two declarations. One was a virtually identical declaration from the same attorney, with the same attachments. The other was from Lieu. Lieu stated he is a board-certified physician in cytopathology and anatomic and clinical pathology, and an assistant clinical professor of pathology at UCLA. He has "performed and interpreted over 8000 fine needle aspiration procedures Based on [his] education, training and experience, [he is] familiar with the FNA procedure and sterile techniques used for an FNA procedure." Lieu stated that, on June 29, 2006, "with the assistance of [Mi, he] performed the FNA procedure on [Law]." Finally, Lieu declared that, "[w]ith an [*sic*] assistance of [Mi, he] used sterile techniques to perform the FNA procedure and to clean the site of the FNA. . . . Complications experienced by [Law] were not indicative of the failure to properly perform the cleaning of the site of the fine needle aspiration procedure."

Law filed an opposition to Lieu's motion. He argued summary judgment was unwarranted because there was a material dispute of fact as to, among other things pertinent here, whether: (1) based on her job description, Mi was qualified to assist with the FNA procedure itself; (2) Lieu should have prescribed other or more medication for Law other than an oral antibiotic; and (3) Lieu told Law, on July 6, 2006, when he prescribed antibiotics for his condition, that "it looked likely that there was infection caused by the operation of the FNA, it might be the medical equipment was not clear

enough and there about [*sic*] five percent of the patients have infections caused by the FNA.”³ (Italics omitted.) Law submitted two declarations in support of his opposition. One was his own in which he stated, among other things, that Lieu told him his was the first FNA procedure he ever performed on a face. Law also declared that he tried but was unable to reach Lieu from June 30 until July 6, when Lieu first prescribed an antibiotic.⁴ The other declaration was from Connie Chang, a “witness” who lived with Law during summer 2006. Law filed a separate statement of genuine issues in opposition to Lieu’s motion. He also objected to Florentine’s declaration asserting, as pertinent here, that: (1) her testimony was incompetent because she lacked personal knowledge of the matters stated in her declaration; (2) his medical records were not attached to Florentine’s declaration; and (3) her declaration was inadmissible because it lacked foundation, was hearsay and did not qualify for an exception to the hearsay rule.

The appellate record does not contain a memorandum of points and authorities from Law in opposition to Mi’s summary judgment motion. It does contain his separate statement of genuine issues in opposition to her motion. In that document Law asserts the existence of a material factual dispute as to whether Mi was qualified to assist with the FNA procedure itself, given the description of her job duties Mi provided in response to discovery and, whether Mi “pay her attention on the operation of FNA,” because Law was the first patient scheduled for surgery on June 29, 2006, in a purportedly “hurry situation” because Lieu’s schedule that day was full.

In his reply brief, Lieu argued he was entitled to summary judgment because Law failed to present the expert evidence necessary to rebut Florentine’s expert opinion that

³ Law asserted the existence of other disputed facts not relevant here. He also sought sanctions based on Lieu’s refusal to withdraw the motion, which revealed Law’s personal information.

⁴ Attached to Law’s declaration were numerous unidentified medical records (which differ from the records attached to respondents’ attorney’s declarations), photographs, an incomplete set of form interrogatories he had propounded to Mi, and an incomplete copy of her response thereto.

Lieu met the applicable standard of care. As a result, Lieu maintained Law had failed to establish the existence of a triable issue as to professional negligence or causation.

In her reply brief, Mi asserted she had provided proof she is a certified medical assistant to Law in response to written discovery he propounded.⁵ She asserted that, by virtue of that certification, she was qualified to carry out Lieu's instructions and perform any task he required her to perform at the office. Mi maintained Law had failed to rebut Lieu's testimony regarding his knowledge and familiarity with sterile techniques and his observation that, when she assisted him with the FNA procedure performed on Law, Mi satisfied the relevant standard of care by "properly . . . cleaning . . . the site."

At the hearing on the motions, the trial court summarily overruled Law's evidentiary objections and refused his request to continue the hearing to obtain an expert witness. The court found Law had failed to demonstrate the existence of a triable factual issue, and granted judgment in favor of Lieu and Mi. This appeal follows the trial court's subsequent denial of Law's motion for reconsideration and entry of judgment.

DISCUSSION

Law contends the trial court erred in granting Lieu's summary judgment motion. The primary argument is that Florentine's "standard of care" opinion declaration is inadequate and that, as a result, Lieu failed to carry his burden to show the cause of action for professional negligence could not be established. We agree. Law advances a similar argument with regard to Mi. On that point, however, we conclude Law has failed to carry his burden to demonstrate reversible error.

1. Principles governing summary judgment motions and medical malpractice actions.

To secure summary judgment, a moving defendant must prove an affirmative defense, disprove at least one essential element of the cause of action, or show the action lacks merit because the plaintiff cannot establish an element of the claim. (*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 750.) Once and only if this

⁵ The response refers to an attached resume; it is not in the record.

showing is made, the burden shifts to the plaintiff opposing the motion to establish the existence of a material factual issue. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; Code Civ. Proc., § 437c, subds. (a), (p)(2).)

“[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) That burden involves the presentation of evidence. (*Ibid.*; Evid. Code, § 110.) “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Aguilar, supra*, 25 Cal.4th at p. 851.) To satisfy its initial burden, the movant must support its motion “by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken.” (Code Civ. Proc., § 437c, subd. (b)(1).) Supporting declarations and affidavits “shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations.” (Code Civ. Proc., § 437c, subd. (d).)

“In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen. [Citation.]” (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523.) However, the expert’s opinion must rest on a sound evidentiary foundation. An expert’s opinion regarding matters not in evidence has no probative value, and will not support summary judgment. If the record lacks independent evidence of a patient’s treatment history, the expert may not establish those facts simply by describing or relating the contents of medical records on which he or she relied to form an opinion. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743 (*Garibay*).)

2. *Lieu was not entitled to summary judgment.*

We find *Garibay* instructive. In that medical malpractice case, summary judgment was entered in favor of the defendant surgeon. The judgment was based solely on the strength of a standard of care opinion from another physician who was not a percipient

witness. His expert opinion that the defendant had satisfied the standard of care was based on facts derived from medical records furnished to him. (*Garibay, supra*, 161 Cal.App.4th at pp. 739–740.) However, the underlying medical records were not offered in evidence, nor was there deposition testimony or any other evidence of the allegedly negligent medical procedure. The *Garibay* court found the expert’s declaration lacked evidentiary value and was insufficient to warrant judgment in favor of the surgeon.

The court acknowledged that, although medical records are hearsay, they may be admitted under the “business records” exception to the hearsay rule.⁶ (*Garibay, supra*, 161 Cal.App.4th at p. 742, citing *In re Troy D.* (1989) 215 Cal.App.3d 889, 902; Evid. Code, § 1271.) To qualify, however, the medical records must be properly authenticated. (*Garibay, supra*, 161 Cal.App.4th at p. 742.) In *Garibay*, the expert “had no personal knowledge of the underlying facts of the case, and attempted to testify to facts derived from medical and hospital records which were not properly before the court. Therefore, his declaration of alleged facts had no evidentiary foundation. An expert’s opinion based on assumptions of fact without evidentiary support has no evidentiary value.” (*Id.* at p. 743.) The evidentiary situation here is worse.

First, as in that case, Florentine’s expert declaration was inadmissible because Law’s medical records were never offered in evidence, let alone properly authenticated. (Evid. Code, §§ 1560, 1561.) In fact, no testimony was offered to authenticate any medical record. Although an expert medical opinion may be founded on hearsay, “‘a witness’s on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into “independent proof” of any fact.’” (*People v. Gardeley*

⁶ The business records exception provides that “[e]vidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.” (Evid. Code, § 1271.)

(1996) 14 Cal.4th 605, 619.)” (*Garibay, supra*, 161 Cal.App.4th at p. 743.) The mere recitation by Lieu’s attorney in her declaration that she had attached “selected excerpts” of Law’s medical records is insufficient on its own to authenticate those records, and overcome the hearsay problem. The minimum required of counsel, in addition to the authenticating affidavit from the custodian of records, was a declaration that the attached documents are true copies of all the records pertaining to Law’s treatment delivered to Lieu’s attorneys. (Evid. Code, §§ 1400, 1401, 1561, subds. (a), (c).)

Second, Florentine’s conclusory declaration does not even approach the level of specificity found deficient in *Garibay*. She does not identify which medical records she reviewed and relied on to form her opinion. The “selected excerpts” of Law’s medical and hospital records which Lieu’s attorneys chose to include in support of his motion, are completely different from the equally unauthenticated, but more extensive, records Law submitted in opposition to that motion.

Florentine’s declaration also makes cursory reference to the undisputed fact that Lieu performed an FNA procedure on Law, and recites the chronology of the treatment of the infection on Law’s face. However, Florentine fails to provide a single detail regarding the standard of care applicable in the community of cytopathology for the FNA procedure itself, or to explain why the mere provision of an oral antibiotic for a patient experiencing significant pain and increased swelling at or near the site where an FNA procedure was performed eight days earlier, constitutes appropriate “aftercare.” Florentine does not refer at all to any aspect of the preparatory sterilization techniques or FNA procedures that should have been or were actually employed by Lieu. Yet, in the absence of such critical information, Florentine broadly opined that Lieu’s care and treatment of his patient was, “at all times and in every respect within the accepted community standards,” and that he “properly performed the fine needle aspiration using sterile techniques, and provided the appropriate aftercare.”⁷

⁷ Florentine’s declaration also refers to the “fact” that Law “signed a consent form acknowledging the risks associated with the FNA procedure.” That representation suffers

Florentine's declaration is inadmissible. Without that declaration, there is no evidence Lieu's treatment of Law met the standard of care, and summary judgment should have been denied. In a medical malpractice case, "an [expert's] opinion unsupported by reasons or explanations does not establish the absence of a material fact issue" (*Kelley v. Trunk, supra*, 66 Cal.App.4th at p. 524.) Because Lieu failed to meet his burden of production, the burden never shifted to Law requiring him to provide his own expert declaration. "Where the party moving for summary judgment fails to meet its burden, 'summary judgment must be denied despite the lack of opposing declarations.' [Citation]." (*Garibay, supra*, 161 Cal.App.4th at p. 743.) Lieu failed to establish that Law could not prove his negligence claim, the evidentiary burden never shifted to Law, and Lieu's summary judgment motion should have been denied.

3. *Mi's motion for summary judgment was properly granted.*

As noted above, Law neglected to designate his complaint, respondents' answers thereto, or his opposition to Mi's motion for summary judgment for inclusion in the appellate record. As a result, it is difficult to ascertain the negligent acts or omissions for which Mi is allegedly responsible. As we understand his arguments, it appears Law's only legally cognizable complaint against Mi is that she is not qualified to assist Lieu to perform the FNA procedure, which he insists was done with nonsterile equipment.⁸

from the same fatal flaws as the rest of Florentine's declaration. Moreover, even if we did consider the unauthenticated "Consent for Fine-Needle Aspiration and Biopsy" (Consent) proffered by Lieu, it would not advance his cause. First, the Consent is incomplete. It refers to a "patient information brochure" allegedly given to Law explaining the "risks, complications, [and] limitations" of the FNA procedure. The brochure is not in the record, and Law claims he never received the Consent materials. Second, to the extent the Consent itself refers to any "risks," it is the risk that, in some percentage of cases, the FNA procedure may fail to detect cancer. Finally, the Consent does not support Lieu's implied contention that Law's infection was not an unexpected consequence of the FNA procedure; it makes no reference to infections or any complication which may occur as a result of the FNA procedure.

⁸ As with Lieu, Law also complains that Mi does "not even care about [Law], and never go to the hospital take look of [Law], although the hospital only one mile away

Law's claim against Mi is premised solely on her response to form interrogatory No. 2.11(b), in which she described her job duties as: "Label slides, stain slides, login report, answering phones, call patient, making appointments for patient, and billing." Law maintains that, based on this description, Mi lacked the professional qualifications to assist Lieu to perform the FNA.

Mi submitted a declaration from Lieu to support her motion. Lieu is a clinical professor of pathology. He has significant education, training and experience in, and has undisputed expertise in the field of cytopathology. He has performed at least 8,000 FNA procedures. Lieu was a percipient witness to the preparation and actual FNA procedure performed on Law. Although Lieu's declaration is cursory, he testified, based on his experience, knowledge of appropriate sterilization techniques and his actual observation of and participation in the FNA performed on Law, that he and Mi "used sterile techniques to perform the FNA procedure and to clean the site of the FNA." Given his expertise, Lieu's first-hand observations provide a sufficient evidentiary foundation to show Law cannot establish at least one element of his claim of professional negligence against Mi. Law produced no expert or other evidence to rebut this showing.

This was a sufficient showing for the trial court, which found Law failed to demonstrate the existence of a triable factual issue as to the claim alleged against Mi.

The appellate perspective begins with the presumption that the trial court's judgment is correct. The burden is on Law, as appellant, to overcome that presumption of correctness and demonstrate reversible error. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) It is the appellant's responsibility to provide an adequate record demonstrating error (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132), with specific citations to the record, appropriate argument and citations to authority. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522–523.) These requirements apply

from [Lieu's] office" [Sic.] Such conduct is not relevant to a claim of professional negligence.

equally to appellants acting without counsel. (*McComber v. Wells, supra*, 72 Cal.App.4th at pp. 522–523.) Law has failed to satisfy his burden to demonstrate the existence of a material factual issue as to Mi’s liability. Accordingly, we conclude summary judgment was properly granted in Mi’s favor.⁹

DISPOSITION

The judgment in favor of Lieu is reversed, and the matter is remanded as to Lieu. In all other respects, the judgment is affirmed. Law and Lieu shall bear the costs of appeal.

NOT TO BE PUBLISHED.

WEISBERG, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

⁹ In light of our conclusion that Lieu failed to meet his burden on his motion for summary judgment, we need not reach Law’s other contentions that reversal of the judgment is required as to that respondent. They are, that the trial court erred by: (1) refusing his request to continue the hearing on the summary judgment motion, and (2) denying his motion for reconsideration of the order granting summary judgment.

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.